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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

DATE: **FEB 12 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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**DISCUSSION:** The employment-based immigrant visa petition was recommended for approval by the Texas Service Center (TSC), which also certified the case for review to the Administrative Appeals Office (AAO). The AAO will withdraw the TSC's approval, and deny the petition.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL). The ETA Form 9089 specifies that the minimum educational requirement for the proffered position is a master's degree in computer science, engineering, business administration, science, mathematics, or a related field of study, or a foreign educational equivalent. It also specifies that no alternate combination of education and experience is acceptable.

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The immigrant visa petition, Form I-140, was filed on October 26, 2011. Documentation submitted with the petition included academic records and diplomas showing that the beneficiary's post-secondary educational credentials consist of the following:

- A Bachelor of Pharmacy from [REDACTED] India, dated February 1, 2005, following completion of a four-year course of study.
- A Post Graduate Diploma in Computer Applications from [REDACTED] in India, dated May 18, 2005, following completion of a one-year course of study.
- A Master of Business Administration from the [REDACTED] in [REDACTED] Virginia, dated June 27, 2009, following completion of a two-year course of study.

On March 1, 2012, the TSC issued a Request for Evidence (RFE), advising that the University of [REDACTED] website indicated that the institution is not accredited. The petitioner was advised to submit evidence that addresses this issue and shows that the beneficiary has the requisite master's degree.

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In response to the RFE the petitioner submitted a brief from counsel and supporting documentation. In his brief counsel pointed out that neither the Act, nor federal regulations, nor internal operating procedures of U.S. Citizenship and Immigration Services (USCIS) applying to advanced degree professionals specify that a U.S. advanced degree must be from an accredited institution in the United States. In counsel's view, therefore, the beneficiary's Master of Business Administration (MBA) from [REDACTED] makes him, *ipso facto*, eligible for classification as an advanced degree professional and qualifies him for the job under the terms of the labor certification. The accreditation status of [REDACTED] counsel contends, is not determinative.

As evidence of the [REDACTED] standing as a respected educational institution, counsel submitted documentation showing that it was certified by the Department of Homeland Security (DHS) in 2003 to participate in the Student Exchange Visitor Program (SEVP). According to counsel, DHS certified that [REDACTED] (1) is an institution of higher learning which awards recognized bachelor's, master's, doctor's or professional degrees, (2) is an otherwise bona fide school, (3) possesses the necessary facilities, personnel, and finances to conduct instruction in recognized courses, and (4) is engaged in instruction of those courses. Counsel also submitted an excerpt from [REDACTED] website indicating that the institution is certified to operate by the [REDACTED] in [REDACTED], that [REDACTED] "is authorized by the U.S. government to enroll non-immigrant students" [SEVP program], and that [REDACTED] "is not accredited" though currently working to acquire accreditation. [REDACTED] (accessed May 23, 2012). Counsel submitted an excerpt from [REDACTED] website entitled "Explanation of Certification" which states that "postsecondary educational institutions that are certified to operate in Virginia must meet certain standards of operations that include faculty preparation, financial stability, maintenance of student records, library and classroom facilities, procedures for student admissions and graduation, organizational and administration standards of operation, and consistency of a school's state purpose with the proposed offerings . . . . Certification is not the same as accreditation; however, an institution must obtain state approval before seeking accreditation." [REDACTED] (accessed May 24, 2012). According to [REDACTED] acting registrar in a letter dated May 2, 2012, [REDACTED] was accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) from April 2003 to August 6, 2008, but lost that accreditation before the beneficiary completed his degree requirements and received his MBA. No documentation of the alleged certification was submitted from the ACICS itself.

On October 5, 2012, the [REDACTED] recommended approval of the petition and certified it for review to the AAO.

The regulation at 8 C.F.R. § 103.4(a)(1) provides that certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." The AAO conducts its review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The issues on certification are twofold:



- Whether the beneficiary's degree from [REDACTED] makes him eligible for classification as an "advanced degree professional" under section 203(b)(2) of the Act.
- Whether the beneficiary's degree from [REDACTED] meets the educational requirement set forth on the ETA Form 9089 (labor certification) to qualify him for the job of software engineer.

#### **Eligibility for the Classification Sought**

The ETA Form 9089 in this case was accepted for processing by the DOL on March 18, 2011, and certified by the DOL on May 10, 2011. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. § 1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. § 1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

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At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”<sup>1</sup> In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is

<sup>1</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

the “foreign equivalent degree” to a United States baccalaureate degree (plus five years of progressive experience in the specialty). See 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree” (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3<sup>rd</sup> Cir. 1995) per *APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received from a college or university, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).<sup>2</sup>

While the regulatory language of 8 C.F.R. § 204.5(k)(2) does not specifically state that a degree must come from an accredited college or university to qualify as an “advanced degree,” that requirement is implicit in the regulation. As stated by the DoEd on its website:

The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition . . . must meet the Secretary’s procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . . The Secretary . . . makes the final determination regarding recognition.

The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.

<sup>2</sup> Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability”).



... [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

... Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

[www.ed.gov/print/admins/finaid/accred/accreditation.html](http://www.ed.gov/print/admins/finaid/accred/accreditation.html) (accessed January 29, 2013).

The DoEd's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .

CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.

Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

[www.chea.org/pdf/Recognition\\_Policy-June\\_28\\_2010-FINAL.pdf](http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf) (accessed January 29, 2013).

The DoEd and CHEA recognize six regional associations – covering the entire United States and its outlying possessions – that accredit U.S. colleges and universities. One of these is the Southern Association of Colleges and Schools, Commission on Colleges (SACS/COC) – whose geographical

scope encompasses 11 southern states, including [REDACTED] and whose membership is broadly representative of the accredited institutions as well as the public. The SACS/COC website includes an alphabetical listing of all accredited institutions in its jurisdiction, as well as shorter alphabetical listings of institutions that have applied for accreditation or are candidates for accreditation. The [REDACTED] does not appear on any of those lists. [REDACTED] (accessed January 29, 2013). Thus, [REDACTED] is not accredited by SACS/COC, is not a candidate for accreditation, and has not even applied for accreditation.

Accreditation of a college or university by a regional accrediting body recognized by the DoEd and CHEA is a badge of quality. As stated on their respective websites, accreditation is intended “to assure academic quality and accountability” (CHEA) and to provide “a reasonable assurance of quality and acceptance by employers of . . . degrees” awarded by the accredited institutions (DoEd). Moreover, the imprimatur of a regional accrediting agency guarantees that a school’s degrees will be recognized and honored nationwide. By comparison, there is no guarantee that degrees awarded by an unaccredited institution will be recognized and honored nationwide. Mere certification to operate by a state agency, as [REDACTED] is by [REDACTED], does not equate to nationwide recognition of the institution or its degrees.

The Immigration and Nationality Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining “advanced degree” for the purposes of section 203(b)(2) of the Act, as well as 8 C.F.R. § 204.5(l)(2) defining “professional” for the purposes of section 203(b)(3) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an “advanced degree” includes “any **United States academic or professional degree** . . . above that of baccalaureate” (or a foreign equivalent degree), “[a] **United States baccalaureate degree**” (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master’s degree), and “a **United States doctorate**” (or a foreign equivalent degree). (Emphases added.) Similarly, “professional” is defined in 8 C.F.R. § 204.5(l)(2) as “a qualified alien who holds at least a **United States baccalaureate degree**” (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier “United States” to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency approved by the DoEd and CHEA.

For educational institutions in [REDACTED] where [REDACTED] is located, the regional accrediting agency is the SACS/COC. As previously discussed, [REDACTED] does not appear on any of the SACS/COC lists as either an accredited institution, a candidate for accreditation, or an applicant for accreditation.

Accordingly, the beneficiary’s Master of Business Administration from [REDACTED] cannot be deemed to have nationwide recognition. Therefore, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).



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Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2). Thus, the petition cannot be approved.

#### **Qualifications for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F.2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification – "Job Opportunity Information" – describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective

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employer. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, Part H, lines 4, 4-B, 7, and 7-A of the labor certification state that the minimum educational requirement to qualify for the proffered position is a master's degree in computer science, engineering, business administration, science, mathematics, or a related field. Line 9 states that a "foreign educational equivalent" is acceptable. Lines 5, 6, and 10 state that no training or experience is required. Line 8 states that no alternate combination of education and experience is acceptable. Thus, the labor certification requires a U.S. master's degree or a foreign equivalent degree in one of the indicated fields.

The beneficiary does not meet the above requirement(s). As previously discussed, the beneficiary's degree from the [REDACTED] though called a Master of Business Administration, does not qualify as a U.S. master's degree under the "advanced degree" definition of 8 C.F.R. § 204.5(k)(2) because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the DoEd and CHEA. Nor does the beneficiary have a foreign educational equivalent to a U.S. master's degree. Since he does not fulfill the educational requirements in Part H of the labor certification, the beneficiary does not qualify for the job offered. For this reason as well, the petition cannot be approved.

### **Conclusion**

The beneficiary does not have an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2), and thus is not eligible for preference visa classification under section 203(b)(2) of the Act. Nor does the beneficiary meet the educational requirements on the labor certification to qualify for the job offered.

For the reasons stated above, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. See Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The recommended approval of the Texas Service Center on October 5, 2012 is withdrawn. The petition is denied.